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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1850

HARRY HOFFER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HARRY HOFFER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Harry Hoffer, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 25, 1974.

Opinion Below

The opinion of the Court of Appeals, which is not yet reported, is printed in Appendix A, infra.

Jurisdiction

Following a jury trial, petitioner was found guilty in the United States District Court for the Southern District of New York of conspiracy, mail fraud, using a fictitious name, and transporting in foreign commerce securities fraudulently obtained in violation of §§ 371, 1341, 1342, 1343, and 2314 of Title 18 of the United States Code. On September 11, 1973 petitioner was sentenced to three years in prison.

On February 25, 1974 the Court of Appeals for the Second Circuit affirmed petitioner's conviction (Appendix B, *infra*), and a timely petition for rehearing and for rehearing *in banc* was denied by that Court on April 11, 1974 (Appendix C, *infra*). Mr Justice Thurgood Marshall extended petitioner's time for filing his petition to and including June 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The numerous and lengthy statutes involved in this case are assembled in Appendix D, *infra*.

Constitutional Provisions Involved

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Questions Presented

1. Whether the federal hearsay exception, rendering admissible co-conspirators' declarations made in furtherance of an ongoing conspiracy, should be enlarged to include declarations made nine months after the achievement of the conspiratorial objectives where:

   (a) there was still a threat of civil suit by the victim against the conspirators, and the declarations could be regarded as designed to mislead the victim and forestall any civil suit, or

   (b) the conspirators might take steps to retain the fruits of the crime, or

   (c) the statements could be regarded as against the pecuniary interests of declarants, unavailable to testify.

2. Whether 18 U.S.C. § 1342, making it a crime to use or assume any fictitious, false or assumed name for the purpose of mail fraud should be expanded by interpretation to apply to the use of names of actual persons and corporations with their knowledge and consent where such use could be regarded as designed to conceal the defendant's own role in the transaction.

3. Whether the Federal standard of "harmless error" applicable to error of constitutional dimension requiring

proof beyond a reasonable doubt that "the error complained of did not contribute to the verdict obtained" should also be applied in assessing the effect of acknowledged errors of a non-constitutional nature arising during the trial or in the jury instruction.

4. Whether in reviewing the sufficiency of the evidence against a defendant in a Federal criminal case, an appellate court may properly give greater weight to such evidence or permit the jury to draw otherwise impermissible inferences, merely because of the defendant's failure to take the stand or to offer any independent evidence in support of his defense.

5. Whether 18 U.S.C. § 1341, making it a crime to use the mails "for the purpose of executing" a fraudulent scheme, may properly be applied where the alleged scheme involves real estate transactions and the mails are used only to transmit to the addressee, for his convenience, papers in no way necessary for the execution of the transactions.

6. Whether it was a violation of the fundamental principles of international comity and prejudicial error to permit bank employees who had formerly been employed at a bank in the Bahamas to testify concerning transactions that had taken place at that bank in direct violation of the order of a Bahamian court prohibiting such testimony under a Bahamian bank secrecy statute.

Statement of Facts

Petitioner, Harry Hoffer, was charged along with John Frank, Stephen Borgman and Alfred Hemlock* with con-

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* Separate petitions for certiorari have been filed in this Court by each of the other three defendants. Borgman's petition is no. 73-1603 Frank's petition is no. 73-1674 and Hemlock's petition is being filed simultaneously with the instant one.

spiring to defraud Maria Dominguez (Trujillo), the daughter of the late dictator of the Dominican Republic, of a substantial sum of money by arranging to sell her land in Montreal at a price ten times its actual value.

Hoffer's sole connection with this case was as an employee in Hemlock's law firm which performed certain legal services relative to these land transactions. He never attended any of the meetings where the purchase of Canadian land was discussed and there was no proof that he ever met Frank or Borgman. Maria Dominguez admitted that she hardly knew Hoffer and that he never suggested she buy Canadian land.

Sale of Canadian Land

Maria Dominguez arrived in this country in 1967, after her father's assassination, with at least eleven million dollars (352).* She sought and received financial advice from John Frank and Stephen Borgman (338, 375, 376). They suggested that she purchase land in Montreal, Canada, as a hedge against the devaluation of the American dollar.

Eventually, two parcels of land in Montreal were sold to Maria Dominguez on January 11 and February 5 of 1968. The land was conveyed to a Luxemburg corporation solely owned by Maria Dominguez called Planinvest. The government claimed the first parcel cost $79,000 and was sold to Planinvest for $778,500, and the second parcel cost $8,000 and was sold to Planinvest for $361,000 (198, 199, 228).

The closings of title were held in Nassau, the Bahamas and Hemlock and his employee Hoffer were both present

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* Refers to the pages of the joint appendix in the United States Court of Appeals for the Second Circuit.

and attended to a number of the details of the closing. Hoffer was also assigned the task of performing some of the ministerial duties in preparation for the closing.

Maria Dominguez claimed that she first learned of the purchase of Canadian land when Borgman told her of that investment months after the closing (209). She went to Hemlock, one of her lawyers, and asked him to investigate these purchases (219, 224). Eventually, he scheduled a meeting at his law office which was attended by Frank, Borgman, Maria Dominguez and Hemlock (427). Hoffer was not present. Maria Dominguez testified at that meeting Frank admitted the Canadian property was not worth what was paid for it but that the surplus money had been used to pay CIA agents to execute one of her father's assassins (427).

Petitioner's Participation

Petitioner is forty years old, married and the father of three children. He was admitted to the practice of law in New York in 1961. He worked as Hemlock's employee and had no partnership interest in the law firm nor did he share in any of the firm's profits (613, 614).

The services performed by him as an employee of the law firm handling these land transactions were menial. For instance, he was directed to forward certain corporate records in connection with the transfer of the Montreal property a Canadian Notary who helped implement the conveyance of the real estate. Petitioner was unfamiliar with the details of the sale (525). Since the sale of this Canadian land was made through and to foreign corporations, the closing place was fixed in the Bahamas. Hoffer's presence there was necessitated by the legal work he performed in connection with these land transactions.

As indicated, petitioner was convicted of conspiracy, using a fictitious name to carry out a fraudulent scheme,

using the mails for the execution of that scheme and transporting in foreign commerce fraudulently obtained securities. On September 11, 1973 he was sentenced to an aggregate term of three years' imprisonment.

REASONS FOR GRANTING THE WRIT

POINT I

Petitioner's Sixth Amendment right of confrontation was violated by the use against him of a conspirator's declaration made nine months after the achievement of the conspiracy's objectives.

The constitutional issue which dominates this petition involves a dangerous expansion of the federal rule governing hearsay exceptions drafted by this Court in *Krulewitch* v. *United States*, 336 U.S. 440 (1949). The prosecution was allowed to prove against petitioner the most damning admissions made by another defendant long after the conspiracy charged in the indictment had terminated. This confession (Frank's admission that the Canadian property was not worth what Maria Dominguez paid for it, and his unique explanation that the surplus monies were used to execute one of her father's assassins) made binding on the petitioner, occurred nine months after the sale of the Canadian land to Maria Dominguez. Clearly, by that time the alleged conspiracy had terminated. As a consequence, petitioner was ambushed by this devastating hearsay evidence and was unlawfully ensnared in the web of this unseemly conspiracy.

The Krulewitch Rule

In *Krulewitch*, and later in *Grunewald* v. *United States*, 353 U.S. 391 (1957), this Court strictly limited the hear-

say exception in conspiracy cases by holding that an agreement to conceal fraud by whatever means does not render post-conspiracy declarations admissible.*

The Second Circuit has simply refused, without justification or elaboration, to give effect to an unbroken line of cases decided by this Court consistently holding that this form of evidence is inadmissible against a co-defendant. As such, the Court of Appeals' judgment has extended greatly the hearsay exception, making a large number of defendants vulnerable to this precarious evidence, placed beyond challenge by its hearsay nature.

Recently, this Court in *Dutton* v. *Evans*, 400 U.S. 74 (1970) refortified the rule limiting hearsay evidence in conspiracy trials by openly declaring its "disfavor . . . [with] attempts to broaden the already pervasive and wide-

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* In *Grunewald*, this Court stressed:

> "We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished." (353 U.S. at 405)

The rule designed to exclude this form of evidence may not be completely settled. At least one commentator believes, "Under *Krulewitch* it is not clear whether acts of concealment subsidiary to the primary object of the conspiracy can ever defer the running of the statute, and, if they can, precisely what type of evidence will be sufficient to establish the continuance of the conspiracy." Developments in the Law—*Criminal Conspiracy, Harvard Law Review*, Vol. 72 at p. 962.

This uncertainty should form an additional basis for a grant of certiorari in this case.

sweeping net of conspiracy prosecutions."* (400 U.S. at 82.)

The protective walls of *Krulewitch* and *Grunewald*, designed to protect all men from this form of sulfurous evidence, have been dramatically breached under the impact of the Second Circuit's decision. Other prosecutors are bound to swarm through this gap and exploit this advantage in future conspiracy trials. This insurgency cannot be tolerated if the elusive conspiracy doctrine with its frightening hearsay exceptions is to be maintained within the constitutional limits.

This case, better than any other, demonstrates the immense mischief that a violation of this hearsay rule can produce. Only the sheerest circumstantial evidence was presented against petitioner. It is undisputed that he never attended any of the meetings where the purchase of Canadian land was discussed and his only connection with this case involved the performing of certain legal services necessary to complete the land transactions. When the FBI interviewed Maria Dominquez, the government's

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* This Court stressed in *Dutton*:

> "It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise." (400 U.S. at 81)
>
> • • •
>
> "As *Grunewald*, *Krulewitch*, and other cases in this Court make clear, the evidentiary rule is intertwined not only with the federal substantive law of conspiracy, but also with such related issues as the impact of the statute of limitations upon conspiracy prosecution." (400 U.S. at 82)

chief witness, concerning her claim of fraud against the other defendants, she never mentioned Hoffer's name. She sued civilly all the other defendants for damages resulting from these land sales but made no claim against petitioner.

The only direct evidence received against petitioner was these critical admissions which petitioner could not contest because of their hearsay quality. If these crucial admissions had not been received against him, it is reasonable to believe petitioner would not have been convicted.

The Second Circuit was forced to acknowledge that this violation of the hearsay rule was "a troubling question" but attempted to redeem this egregious error by drastically lengthening the list of hearsay exceptions in a conspiracy trial. The court below expanded the hearsay rule to include a situation where:

(a) there was still a threat of a civil suit by the victim against the conspirators, and the declarations could be regarded as designed to mislead the victim and forestall any civil suit, or

(b) the conspirators might take steps to retain the fruits of their crime, or

(c) the declarations could be regarded as against the pecuniary interests of declarants, unavailable to testify.

The manifest purpose of the conspiracy charged in the indictment was the fraudulent sale of land to Maria Dominguez at a price ten times its actual value. Once that sale was terminated, the objective of the conspiracy was accomplished, and the unlawful enterprise concluded. Accordingly, any implied agency relationship was finished. The threat of a civil suit or misleading remarks made by

one defendant to forestall that litigation, or a defendant's statement against pecuniary interest, in no way extended that *agency* relationship and thus, *Bruton* v. *United States*, 391 U.S. 123 (1968) and *Krulewtich* foreclosed the receipt of those admissions against a non-declarant.

The Second Circuit's abrupt departure from this well-reasoned rule is inexcusable. Undoubtedly, more conspiracy prosecutions are being launched in the Federal courts today than at any time past.* This elusive form of accusation has flourished there because convictions are so easily obtained under it. Today, more than ever, reinforcement of the hearsay rule, founded on the Sixth Amendment confrontation clause, is needed to keep conspiracy prosecutions within reasonable limits so that innocent men, like petitioner, are not unlawfully drawn within the undertow of that hazardous legal concept. This Court can no longer afford a policy of appeasement in this crucial area of criminal litigation. Time is running out. If something is not done soon, this Court's rule designed to limit the use of hearsay in conspiracy trials, will be left in a shambles.

For all these reasons the petition for a writ of certiorari should be granted.

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* Within the last year alone this Court considered petitions for certiorari in 43 cases involving vigorous complaints against the misuse of the conspiracy doctrine. This number was obtained from the Criminal Law Reporter published by the Bureau of National Affairs in Washington, D. C.

POINT II

Section 1342, making it a crime to use a fictitious name for the purpose of mail fraud, was given an overly broad construction by the Second Circuit so as to apply it to persons who used real corporations and genuine people.

Section 1342 of Title 18 makes it a crime for a person to use a fictitious name to defraud another through the use of the postal service. However, in this case it is uncontradicted that the two Bahamian corporations, Columbia and Splindian, and the three individuals who participated in the land transactions, i.e., Lefkowitz, Hepburn and Neill, were in every respect genuine. The government conceded this, but urged the statute should be construed to cover situations where persons who have no substantive interest in the enterprise are inserted into a fraudulent transaction for the sake of concealing the identies of the true beneficiaries of the scheme. This broad interpretation was adopted by the Second Circuit and welded onto this criminal statute.

The Fifth Circuit, in construing section 1342, concluded that in order for a person to come within the clutches of this provision, they must actually use a fictitious or false name in promoting their fraudulent scheme. *Tingle* v. *United States,* 87 Fed. 320, 323 (5th Cir. 1898).

The Second Circuit's unwarranted and overexpansive construction of section 1342 stretches the plain language of this law beyond recognition and sadly overtaxes the statute. *Rewis* v. *United States,* 401 U.S. 808 (1971) and *United States* v. *Bass,* 404 U.S. 336 (1971).*

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* In both *Rewis* and *Bass,* this Court halted a broad construction of federal criminal statutes holding, " . . . Our policy in con-

(Footnote continued on following page)

Another significant feature of this case which must not escape the Court's attention involves the inadequate notice to the public as to what conduct must be avoided by the broad construction of this statute. This Court was careful to point out in *Bass* that given any broad construction in a criminal statute, its interpretation must, of constitutional necessity, involve ". . . the narrow reading . . . [and] in favor of lenity" the reasons for invoking this well-settled principle of law that a fair warning should be given to the public in language that the common man will understand is so that disobedience can be avoided. Secondly, because of the seriousness of criminal sanctions, "legislatures and not courts should define criminal activity." (*United States* v. *Bass*, 404 U.S. at 338). In our case no one could have guessed, by reading the statute, that it included conduct of using real names and companies to conceal another's identity. The statute is uninhabited by any words that suggest such an interpretation.*

(Footnote continued from preceding page)

stitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation." *United States* v. *Denmark*, 346 U.S. at 449.

"And even if this lack of support [for a broader reading] were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. at 812.

*We had thought that this Court's admonitions to federal prosecutors against over-extending our federal criminal law in *Bass* and *Rewis* were more than adequate, but apparently further instructions are needed. For surely the Second Circuit's interpretation of §1342 is far more expansive than that asserted by the government in *Bass* and *Rewis* and will inevitably have a far more dramatic impact upon law enforcement.

The interpretation imposed upon § 1342 by the Second Circuit seriously endangers every undisclosed principal of a business enterprise in the United States. If by chance harm came to a consumer through the use or purchase of merchandise sold through the mail by a business owned by undisclosed principals, criminal liability arises under this statute. Certainly that goes far beyond Congress' intentions in creating this law.

For this reason alone the petition for certiorari should be granted.

POINT III

The Second Circuit improperly applied the "harmless error" rule to conceded erroneous jury instructions and other errors in the conduct of a federal conspiracy trial.

Other major fissures in the Second Circuit decision, which create problems worthy of this Court's consideration, are:

(a) the trial court's erroneous jury instructions on the crucial issue of collateral estoppel;

(b) the misuse of an interpreter by the governments' chief witness;

Although these issues are fully developed in the petitions of Borgman (73-1603), John Frank (73-1674) and Alfred Hemlock (filed contemporaneously with this petition), we feel obliged to restate them here. However, in some instances we will rely upon the authorities more fully set forth in these other petitions.

Collateral Estoppel

Prior to the commencement of the criminal proceedings against petitioner, Maria Dominguez brought a federal suit to recover the sums claimed to be taken from her by the other defendants.* At the criminal trial, petitioner and the other defendants sought an instruction informing the jury that Mrs. Dominguez could use the criminal conviction against them in a civil suit. This instruction was critical to the jury's proper evaluation of her credibility. The court erroneously declined that instruction. The Second Circuit acknowledged the error but labeled it "harmless." The cases and authorities assembled in the Hemlock petition, authorize review of this case.

Misuse of Interpreter

Maria Dominguez was able to successfully speak English through most of her direct examination. However, over defense counsel's strenuous objection, during her cross-examination she repeatedly resorted to the interpreter when the cross-examiner was on the verge of success. The Second Circuit was forced to say, "We are not altogether happy about the manner in which this matter was handled" (24a-25a). Nevertheless, the court concluded that this abusive use of an interpreter was harmless. Maria Dominguez was the only witness who inculpated any of the defendants. Accordingly, based upon the authorities cited in the companion petitions, it is urged the harmless error doctrine was misapplied.

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* While petitioner was not named as a defendant in the civil suit, the restraint placed upon all the defendants in their efforts to inform the jury of Mrs. Dominguez' monetary interest in obtaining a conviction equally affected the jury's evaluation of her credibility and thus had an impact on petitioner's case.

POINT IV

The Second Circuit misapplied the presumption of innocence in sustaining petitioner's conviction.

In judging petitioner's complaint that the evidence was insufficient as a matter of law to support his conviction, the Second Circuit rejected his claim by drastically modifying the presumption of innocence in the following manner:

> "When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version."* (A-14, A-15).

Furthermore, the court of appeals announced a higher standard of conduct to be used for judging lawyer's guilt than that of an ordinary person.** Both these shocking pronouncements represent a startling digression from a long line of cases forged by this Court sanctifying the

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* The court also acknowledged:

> "To be sure, the defendants were not required to testify or to present any case at all, and the jury could not permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense . . . to the level of a convincing refutation." (A-14)

** We repeat also that *lawyers* cannot "escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen." [citing authorities of the Second Circuit,] and cases there cited. (Emphasis supplied)

presumption of innocence for all men in criminal prosecutions.*

Here the petitioner elected to rest upon his presumption of innocence, firmly believing that under no circumstances could either the jury or an appellate court draw an unfavorable inference from the exercise of that constitutional right or draw inferences that would otherwise be impermissible. The Second Circuit has seriously undermined that great constitutional safeguard. The consequences flowing from this critical misjudgment could be unending.

This dangerous and unauthorized precedent cannot be allowed to stand, for if this judgment is not corrected, then any lawyer facing a criminal prosecution, who chooses to remain silent and rely upon his presumption of innocence, is in jeopardy. Without reference to any other error, this complaint is reason enough to grant certiorari here in order to restore the presumption of innocence to its appropriate place in our hierarchy of constitutional values.

At the very least, the Second Circuit should be ordered to reconsider the sufficiency of the evidence of guilt without regard to the defendants' failure to take the stand and without permitting inferences to be drawn that are otherwise impermissible. The traditional standards of ap-

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* *In re Winship*, 397 U.S. 358 (1970); *Speiser* v. *Randall*, 357 U.S. 513, 525, 526 (1958); *Holland* v. *United States*, 348 U.S. 121, 138 (1954); *Leland* v. *Oregon*, 343 U.S. 790, 795 (1952); *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949); *Michaelson* v. *United States*, 266 U.S. 42 (1924); *Wilson* v. *United States*, 232 U.S. 563, 569, 570 (1914); *Holt* v. *United States*, 218 U.S. 245, 253 (1910); *Davis* v. *United States*, 160 U.S. 469, 488 (1895); *Coffin* v. *United States*, 156 U.S. 432 (1895); *Miles* v. *United States*, 103 U.S. 304, 312 (1880).

pellate review of criminal convictions should once again be reaffirmed and reinforced, through review and reversal of the dangerous abberations of those standards by the Second Circuit.

POINT V

The Court of Appeals has applied the Mail Fraud Statute, 18 U.S.C. §1341, contrary to the standards established by this Court in *United States* v. *Maze*, 38 L. Ed. 2d 603.

Petitioner was convicted of mail fraud because he sent photocopies of two sets of corporate records through the mail with letters of transmittal. These records were forwarded in the ordinary course of his duties as an employee of the law firm handling these legal transactions. He had nothing to do with the creation of these corporate entities. Petitioner had no way of knowing that by merely transmitting these inherently legitimate corporate records through the mail he was participating in an allegedly fraudulent scheme.

This Court, in *United States* v. *Maze*, U.S. , 94 S. Ct. 645 (1974), concluded that credit card mailings which resulted in the defendant's mail fraud conviction were not essential to the execution of the fraudulent scheme contemplated by §1341. Our case is precisely the same. Here, the transactions had been completed when the corporate records were sent to the Canadian authorities. These mailings were not sufficiently connected to the transaction to be part of the fraud. See also *Miles* v. *United States*, No. 73-752 decided March 19, 1974 (Judgment summarily reversed under the authority of *Maze*.)

Accordingly petitioner's writ should be granted and his conviction summarily reversed.

POINT VI

The Court of Appeals committed error and violated the principles of international comity in approving the introductory of testimony in a Federal trial in direct violation of a lawful order of a Bahamian court entered under a Bahamian bank secrecy statute.

Petitioner respectfully adopts by reference the treatment of this question in the companion petition for certiorari filed with this Court by co-defendant John J. Frank (*Frank* v. *United States*, No. 73-1674).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Decision and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 578-581—September Term, 1973.

(Argued December 20, 1973 Decided February 25, 1974.)

Docket Nos. 73-2384
73-2425
73-2495
73-2408

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, and STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman,

Defendants-Appellants.

Before:

FRIENDLY, HAYS and OAKES,
Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Milton Pollack, *Judge,*

convicting defendants, after a verdict, of conspiracy, various substantive offenses under the mail fraud statutes, 18 U.S.C. §§ 1341-43, and interstate or foreign transportation of stolen money, 18 U.S.C. § 2314. Affirmed.

W. CULLEN MACDONALD, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, and S. Andrew Schaffer, Assistant United States Attorney, of Counsel), *for Appellee.*

LOUIS BENDER, ESQ., New York, N. Y., *for Appellant Frank.*

ARTHUR KARGER, ESQ., New York, N. Y., *for Appellant Hemlock.*

HERALD PRICE FAHRINGER, ESQ., Buffalo, N. Y., *for Appellant Hoffer.*

JOHN M. MCGILLICUDDY, ESQ., New York, N. Y. *for Appellant Borgman.*

FRIENDLY, *Circuit Judge*:

Count 1 of this indictment in the District Court for the Southern District of New York charged the four appellants[1] with conspiring, 18 U.S.C. § 371, to violate the statutes relating to mail fraud, 18 U.S.C. § 1341-43, and interstate or foreign transportation of stolen money, 18 U.S.C. § 2314. Counts 2 through 5 charged appellants with the substantive offense of interstate or foreign transportation of two certified checks in violation of § 2314. Counts 6

[1] The indictment also named as so-conspirators A. Arthur Kay and Maurice S. Hebert, who are unarrested fugatives.

and 7 charged them with violating 18 U.S.C. § 1342 by using fictitious names in carrying out a scheme to defraud by mail. Counts 8 through 16 charged them with unlawful use of mail and wire communication facilities in violation of § 1341 and § 1343.[2] The jury returned guilty verdicts against all appellants on the conspiracy and fictitious name counts. Frank Hemlock and Hoffer were found guilty on the unlawful transportation counts. Hemlock and Hoffer were found guilty on two of the mail fraud counts. The jury acquitted on the remaining counts. The judge imposed substantial prison sentences on all defendants and a $10,000 fine on Hemlock.

I. *The Facts*

The case concerns a fraud allegedly perpetrated on Mrs. Marie Dominguez, the then 28-year-old daughter of former President Rafael Trujillo of the Dominican Republic. Since appellants all challenge the sufficiency of the evidence to warrant submission to the jury, it is necessary to summarize the evidence presented against each defendant. Taken in a light favorable to the Government the facts are as follows:

In the summer of 1967, Mrs. DeLeon, as Mrs. Dominguez then was, left her husband's home in Madrid and came to this country with two of her children. Apparently because her property was the subject of confiscation decrees by the Dominican government, she had placed it in the name of a number of corporations in countries

[2] Judge Pollack did not submit counts eight, eleven and sixteen to the jury but dismissed them at the close of the Government's case.

with bank secrecy laws. One of these, a Luxembourg corporation called Planinvest, held a $2.4 million certificate of deposit in the London offices of the Bank of London and South America.

When she arrived in this country, Mrs. Dominguez was met at the airport by defendant John Joseph Frank, an attorney with an office in Washington, D.C., and a former agent with the F.B.I. and the C.I.A. Mrs. Dominguez' husband had engaged Frank to obtain an entry visa for her, apparently because he had provided security services for the Trujillo family in the past. Frank was accompanied by defendant Borgman, whom he introduced as "Steve Miller", the name we shall also use.

Shortly thereafter, Frank and Miller introduced Mrs. Dominguez to defendant Hemlock, a New York attorney with whom defendant Hoffer was associated. Hemlock agreed to participate in a ruse for the benefit of Mrs. Dominguez whereby, under the pretext of a business negotiation, he would divert her previous husband, Mr. DeLeon, from Madrid to Barcelona, while she took possession of certain of her belongings in the family home in Madrid. The plan succeeded. In September Hemlock and Hoffer began to advise Mrs. Dominguez on a property settlement with her husband, from whom, with the aid of Frank and Miller, she had obtained a Mexican divorce. In the course of this, they learned of Planinvest. Hemlock and Mrs. Dominguez instructed the London bank to transmit interest payments to her personal account at the Bank of New York and to send all communications relating to the Planinvest account "in care of Hemlock, List, Hoffer & Becker, Esqs." at their New York office. In October, on the advice of Frank and Miller, she opened a second

account, at the New York branch of the Bank of London and South America. That account was opened in the name of Planinvest, "c/o John J. Frank, 1500 Massachusetts Avenue, Washington, D.C." Mrs. Dominguez signed one signature card for the account, and Frank and Miller signed a second card to enable them to request statements, deposit slips, checks or a balance relating to the account.[3] During the fall of 1967, Frank and Miller largely took over the conduct of Mrs. Dominguez' day-to-day financial affairs. They had custody of her checkbook, they prepared batches of checks for her signature, and they cashed checks for her at the banks.

Sometime during that fall, Frank and Miller began to recommend that Mrs. Dominguez invest in foreign land, avowedly to avoid loss in the devaluation of the dollar—advice that proved to be wise, although premature—and to avoid high United States taxes. After an adverse reaction from Mrs. Dominguez' brother, Frank and Miller returned to the charge with a recommendation specifically suggesting that she buy Canadian land. According to Mrs. Dominguez, Miller insisted that Canada was booming and that a land purchase there "would be a wonderful investment." Mrs. Dominguez agreed to consider any specific property that they might suggest, but specified that in no event was she willing to spend more than $200,000.

Mrs. Dominguez' limited acquiescence provided an entry for the Canadian land manipulations through which the fraud was sprung. On January 9, 1968, a Dr. George C. Hori sold a parcel of land in the northeastern part of

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[3] On the Government's theory of the case this account served no purpose save as a vehicle for subsequent frauds.

Montreal. The price of the land was $79,000, of which $22,000 was to be paid him in cash and the balance was to be used to clear existing mortgages. The deed executed in the office of a notary, Maitre Elie Solomon, named as the purchaser A. Arthur Kay, one of the two unarrested co-defendants named in the indictment. The parties instructed the notary to hold the deed pending payment into his trust account for disbursement to Dr. Hori and the mortgagees. The notary asked Kay for the names of the Bahamian company to which Kay was planning to resell the land and of the European company to which it would be resold again; Kay said the information would come in a call from New York. Several hours later, Mtre. Solomon received such a call; he was not sure whether it was from Hoffer or Hemlock.[4] The caller said the first name of the Bahamian corporation was "Columbia"; the rest of the information would be supplied the next day in the Bahamas. The notary in turn requested that the caller procure a resolution from the ultimate purchaser authorizing the purchase. He dictated a proposed resolution that would meet the requirements for effecting the transfer.

On January 10, Mtre. Solomon, Kay, co-defendant Maurice S. Hebert, and an attorney, Irving L. Adessky, flew from Montreal to Kennedy Airport in New York City. At

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[4] Solomon testified on direct examination that the call from New York had come from "a gentleman who identified himself as Mr. Harry Hoffer." The court subsequently struck out his direct testimony concerning the telephone call for lack of foundation, but counsel for Hoffer on cross-examination elecited from Solomon that before the grand jury he had testified he had received a call from "either Mr. Hemlock or a member of his firm."

the same time Miller had the New York branch of the Bank of London and South America certify a Planinvest check for $778,500 to Columbia Corporation Ltd.[5] Hemlock, inferably with the check in hand, joined the Montreal party at the airport, whence they flew to the Bahamas, where Hoffer was awaiting them.

The next day the entire group met with a Bahamian attorney, Anthony Hepburn, and his secretary Celia Neill. Kay signed a deed transferring the property to Columbia, which was represented by Hepburn and Neill, its vice-president and assistant secretary. The further transfer from Columbia to Planinvest was delayed because neither Hemlock nor Hoffer had brought a Planinvest resolution authorizing anyone to execute the deed of purchase. While the group was waiting for the arrival of the resolution, Hoffer, in Hemlocks' presence, informed Mtre. Solomon that Planinvest would be represented by one Herbert M. Leftkowitz as agent but that the deed should refer to Planinvest in care of Frank at his Washington, D.C. office; Hoffer also promised to send Solomon certified copies of the charters of Columbia and Planinvest.

A man identified as Lefkowitz appeared at around 1:30 p.m. He produced a resolution which the notary said was substantially what he had dictated to either Hoffer or Hemlock in their telephone conversation two days before.

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[5] The check is signed in the name of Angelita De Leon (the name Mrs. Dominguez used during her first marriage), as President of Planinvest; the Government did not dispute that the signature was hers. The basis for the certification was a telexed tranfer of $780,000 from the main office in London. The record is silent on who directed the transfer.

Appendix A

The resolution recited that at a meeting in New York on January 9, Planinvest had authorized the purchase of the property from Columbia for $1.00 and other good and valuable consideration and had designated Lefkowitz to sign the deed, the document purported to be certified by Mrs. DeLeon as President and Secretary. The notary thereupon authorized execution of the deed from Columbia to Planinvest. However, since he had not received the $79,000 required to clear the initial transaction, the notary refused to release the certified copy of the deed from Columbia to Planinvest. The meeting then adjourned pending the arrival of the funds.

During the same day, January 11, Hemlock and Hoffer met with the Nassau branch manager of the First National City Bank (FNCB), Michael Latvis. They opened accounts for Columbia and for Splindian Investments Limited, another Bahamian corporation. The accounts provided that withdrawals could be made only with the authorization of Hemlock, Hoffer and Frank. Hemlock and Hoffer signed the signature card at that time; Frank's signature was obtained later. Hemlock and Hoffer then presented the $778,500 check from Planinvest to Columbia and arranged for a portion of this to be kept in a time deposit.[6] Notwithstanding the certification, FNCB would not extend immediate credit until the check had been accepted for clearance at the Federal Reserve Bank at New York, a procedure which would normally take eight days. Hoffer and Hemlock suggested the dispatch of a messenger to expedite clearance of the check. Latvis' secre-

[6] Latvis testified that time deposits were available on a 30- and 90-day basis and that to the best of his memory, the deposits in question were placed on a 90-day basis.

tary, Miss Elizabeth Reilly, volunteered for the trip, for which Hoffer and Hemlock made the arrangements.

Miss Reilly presented the check for processing at FNCB in New York around 10:30 a.m. on July 12. That same morning Hemlock, Hoffer, Kay and Hebert met with the notary and Adessky in Nassau; either Hemlock or Hoffer gave Adessky and the notary $500 apiece as compensation for their services. The two lawyers then left for New York. Later Kay took the notary to the Nassau branch of FNCB, where the transfer of $79,000 to the notary's trust account in Montreal was arranged. The notary flew the next day to New York; by prearrangement Hoffer met him at the airport and received a "special copy" of the deed from Columbia to Planinvest.[7] On January 15 Hoffer sent Solomon a copy of Columbia's charter, showing it had been incorporated on November 27, 1967.

Shortly thereafter, Miller told Mrs. Dominguez she had purchased land in Canada. After she protested that she had authorized only inquiry and not action, Frank came into the room. Miller asked if she remembered signing "the check"; she did not. Frank then advised her not to worry and assured her that "everything is all right." In answer to a question concerning the cost of the property, he answered that it was "within the limits" she had previously set. Sometime later, Miller showed her some clippings from U.S. News & World Report and the Wall Street Journal that reported new mineral explorations in various parts of Quebec. Miller told her that the discoveries had already caused her tract of marshy, swampy land near Montreal to appreciate.

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[7] The "special copy" differed from the deed that was delivered in that it did not contain a copy of the resolution but merely referred to a duly authorized resolution.

Appendix A

About a week after the first transaction, Kay inquired whether the notary would be interested in arranging for the sale of some 150,000 square feet of a farm owned by a corporation in which the notary held a minority interest, for no more than $8,000. When Solomon expressed reluctance to proceed with the transaction before hearing from Hemlock or Hoffer, Kay paid him $500 to cover the notarial fees and the preliminary costs of subdivision. The notary thereupon began making arrangements for the sale.

Kay subsequently told the notary that the scenario for the second transaction would resemble that for the first, save for a few changes in names. This time Denise Comeau would take Kay's place as the first purchaser and Splindian, whose charter he delivered to the notary, would be the second. Meanwhile, Mtre. Solomon received a copy of the Planinvest charter from Hoffer; he was disturbed to discover that Planinvest was not expressly empowered to buy and sell land as required by Canadian law, and asked for a copy of the Luxembourg laws that might aid in implying the requisite power. Hoffer never supplied the Luxembourg statutes or any other proof that Planinvest could engage in Canadian real estate transactions.

Miller told Mrs. Dominguez around this time that a very good piece of land in Canada was being sold for tax reasons at less than its worth. She at first demurred, saying that she was unwilling to buy any more land in Canada. Miller then telephoned Frank in her presence and said, "John, she doesn't want to buy the land." After that conversation, Miller once again urged her to consent to the purchase. Finally, she agreed to consider the land, but she insisted that Miller first send a letter to the Bank of London and South America requesting three

different bank appraisals. Miller typed the letter as instructed, but Mrs. Dominguez testified that she never received any response from the bank.

On February 2, 1968 Miller presented to the New York branch of the Bank of London and South America a Planinvest check in favor of Splindian in the sum of $361,500, which the bank certified in consequence of a prior transfer of that sum from London. Two days later the notary Adessky, Kay and Denise Comeau flew to New York. Hemlock joined them, inferably with the certified check in hand, and the group flew on to Nassau where Hoffer was awaiting them.

The following morning the group met with Hepburn, Miss Neill and Lefkowitz for the second closing. The deeds from Solomon's corporation to Miss Comeau and from her to Splindian, acting through Hepburn and Neill, were promptly executed. Although Hoffer supplied no evidence that Planinvest was empowered to purchase foreign real estate, as the notary had requested, the deed from Splindian was executed by Hepburn and Neill, and accepted for Planinvest by Lefkowitz. Hemlock and Hoffer went on to the FNCB, made a time deposit in Splindian's account, and arranged for Miss Reilly to make another trip to New York to expedite the clearance of the Planinvest check. Shortly thereafter Kay paid Solomon $10,856 for the land; $2,856 of this was rebated to Kay upon their return to Montreal.

In February or March, 1968, Arcadio Santana, a former family accountant, left the employ of Mrs. Dominguez' former husband and joined her in New York. She asked him to ascertain from Frank and Miller the precise amount of money that Planinvest had spent on the one acquisition of which she was then aware. Apparently Sant-

ana learned that $778,000 had been paid; when Mrs. Dominguez taxed Frank with this, he once again urged her not to worry and assured her that it was "a good piece of land" and that it was worth the price she paid for it. Shortly thereafter, Hemlock, Hoffer and Frank went to the FNCB in Nassau and asked Latvis to break the time deposits and pay them out in cash, which he did. Since the bank records were not available at the trial because of the Bahamian bank secrecy laws, he could testify only that they withdrew "a large amount, perhaps from 300 to $600,000, $300,000 to $600,000." Also during March, 1968, Frank gave Mrs. Dominguez the special copy of the deed to the Hori tract, see note 7; when she asked him to explain the nominal consideration of one dollar, he called in Miller, who told her that such recitations were usual in Canada.

Unsatisfied with Frank's explanation of the large expenditure, Mrs. Dominguez and her new husband met with Hemlock that June at her home in Queens. The couple gave Hemlock the special copy of the deed and requested that he investigate the transaction. Mrs. Dominguez testified that she thought Hoffer was present at that meeting but could not be certain.[8] Further meetings were held through the summer, primarily for the purpose of discussing Mrs. Dominguez' tax returns which were being prepared by a tax specialist recommended by Hemlock and Hoffer. At one meeting Mrs. Dominguez expressed concern about the Canadian property being in the name of Planinvest, which she thought was not supposed to own land directly. Neither Hoffer nor Hemlock revealed

[8] Mrs. Dominguez testified that although she could not recall which of the summer meetings Hoffer attended, she was certain that he had been at most of them.

their previous exposure to this problem or the purchase from Maitre Solomon. As time passed without the receipt of a report on the initial purchase from Hemlock and Hoffer, Mrs. Dominguez dispatched Santana to Montreal. Early in September, 1968, at a meeting attended by Hemlock, Hoffer and others, she told Hemlock she had learned that he had been in Canada several times making arrangements for the purchase of the lot; he replied "I smell a rat" and "I think somebody has been using my name,"[9] but did not reveal what he in fact knew. She also told Hemlock she had been informed that the lot wasn't worth what was paid for it; Hemlock responded by proposing to set up a meeting with Frank and Miller.

This meeting occurred on September 24 at Hemlock's office. Its first phase was attended by Mrs. Dominguez, Frank, Miller and Hemlock.[10] This time Frank and Miller admitted that the land was not worth what had been paid, but they explained that the difference had been used to pay off the C.I.A. because she had been involved in activities to kill one of her father's assassins. Miller and Frank then left. Mr. Dominguez entered and Hemlock repeated what they had said. In the course of the meeting, Hemlock told Mr. and Mrs. Dominguez nothing about the many other circumstances of the two transactions of which he was aware. Subsequently, Mrs. Dominguez obtained other counsel who began a civil action on her behalf in the

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[9] The record contains no evidence that Hemlock had made such trips.

[10] Hemlock had endeavored to persuade Mrs. Dominguez to come without her husband. After this failed, he did prevail on the husband to wait outside his office.

Appendix A

District Court for the Southern District of New York against Frank, Miller and Hemlock.

II. *Sufficiency of the Evidence*

Putting aside for the moment defendants' legal attack on the charges relating to the fictitious name statutes, 18 U.S.C. § 1342, we think Frank's and Miller's claims of insufficiency are so palpably devoid of merit as not to warrant extended discussion. They were the instigators of the scheme to expend $1,140,000 of Planinvest's funds for land that had been purchased for a total of $89,000, and one or the other or both participated in every phase of the plot. All this is crowned by their admission at the final meeting with Mrs. Dominguez that, contrary to their prior assertions, the land was not worth what they paid for it.

Hemlock and Hoffer claim that the evidence is consistent with their having simply engaged in professional activities and that any wrongdoing was solely Frank's and Miller's. Hoffer makes the further argument that he was acting in a subordinate capacity and thus was even farther than Hemlock from the odoriferous stream of guilty knowledge. But too many red flags were flying to make these contentions plausible. It is useful to recall Judge Learned Hand's observation that "the cumulation of instances each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater than any one of them alone." *United States* v. *White,* 124 F.2d 181, 185 (2 Cir. 1941). We repeat also that lawyers cannot "escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen," *United Sates* v. *Benjamin,* 328 F.2d 854, 863 (2 Cir.), *cert. denied,* 377 U.S. 953 (1964). See also *United States* v.

Sarantos, 455 F.2d 877, 880-82 (2 Cir. 1972), and cases there cited. If Hemlock and Hoffer were acting as attorneys, their client was Planinvest, which they knew to be simply Mrs. Dominguez in an incorporated form. Yet there is no indication that they ever advised her about the seemingly needless interposition of Columbia and Splindian, that they ever made the slightest inquiry concerning the relationship between the large Planinvest certified checks and the modest price which they knew was paid to the Canadian owners, or that they ever notified Mrs. Dominguez that the second transaction had occurred at all. Perhaps the most damaging evidence against them was their personal participation with Frank in the breaking of the time deposit just after Frank had learned that the jig might be beginning to be up. Whether or not they received any portion of the proceeds, they had beheld Frank walking out of the FNCB in Nassau with $300,000 to $600,000 in cash generated by the Planinvest checks to Columbia and Splindian. Six months later, and three months after Mrs. Dominguez had instructed them to investigate the first transaction, they had revealed nothing. Their silence throughout the summer, in light of their intimate familiarity with many of the details of the two purchases, makes their claim of innocence highly implausible. Hemlock's efforts to prevent Mr. Dominguez from attending the showdown on September 23 and his bland reaction to a revelation by Frank and Miller that would have caused an honest lawyer to erupt in fury are the final straws as far as he is concerned.

In passing on the sufficiency of the evidence, the court had only the prosecution's case, the defense having offered none. To be sure, the defendants were not required to testify or to present any case at all, and the jury could not

permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version.[11] The test of sufficiency in criminal cases is "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Curley* v. *United States,* 160 F.2d 229, 232-33 (D.C. Cir.) (Prettyman, J.), *cert. denied,* 331 U.S. 837 (1947), approved in *United States* v. *Taylor,* 464 F.2d 240, 242-45 (2 Cir. 1972). That test was met here not only as to Frank and Miller but also as to Hemlock and Hoffer.

III. *The "fictitious name" statute*

The fictitious name statute, originally adopted in 1889, 25 Stat. 873, and codified as part of Chapter 63 of Title 18 relating to Mail Fraud, reads as follows:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of

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[11] Appellate counsel for Hoffer suggests that the decision of trial counsel not to call this defendant was based simply on a belief that, despite the contrary ruling of the trial judge, the Government had not presented a sufficient case to warrant that course. Perhaps so, but the defendant is bound by the strategy that was chosen.

> this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal car, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

It is not entirely clear what advantage the Government derives from invoking this statute, particularly in a mail fraud case where there is a conspiracy charge, since it applies only when the prosecution has established a "purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business." Be that as it may, the Government did invoke it here and, if it did so erroneously, there would have to be a reversal not only of the convictions under Counts 6 and 7 but perhaps also of the conviction on the conspiracy charge, Count 1, since the judge instructed that a finding of a conspiracy to violate § 1342 would warrant a conviction on the conspiracy count.[12]

Defendants say there was no evidence that any participant used or assumed or requested to be addressed by any

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[12] We say "perhaps" because a conviction of conspiracy to violate § 1342 under the circumstances of this case arguably would include a finding of conspiracy to violate § 1341. *United States* v. *Jacobs*, 475 F.2d 270, 282-84 (2 Cir. 1973); *United States* v. *Alsondo*, 486 F.2d 1339, 1347 n. 5 (2 Cir. 1973) (on rehearing).

fictitious, false or assumed name. Not disputing the literal truth of this[13], the Government contends that the statute should not be read so narrowly but should be construed to cover a situation where persons having no substantive interest, *e.g.*, Kay, Miss Comeau, Columbia, Splindian, Hepburn and Miss Neill, are inserted into a fraudulent transaction for the sake of concealing the identities of the true beneficiaries of the scheme, even though the individuals and corporations are using their actual names. This construction seems reasonable. It was essential to the fraud that the purchasers on the second round should not be Frank and Miller, or even corporations in which they appeared to have an interest. In that sense the defendants did utilize an identity other than their own to conceal their role in the fraud.[14] Such meagre case law as exists seems to support the application of §1342 to facts such as these, in result if not in discussion. *See e.g., United States*

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[13] The Government does not urge that defendant Borgman's use of the name Miller satisfies the statute; apparently Borgman had been calling himself Miller for some time and Mrs. Dominguez was in no way deceived by this. It does urge that the jury could properly have found that "Lefkowitz" was not the shadowy individual's real name. We doubt there was sufficient evidence of this.

[14] The fact that the name used by the defendant belongs to a real person has long been held insufficient to avoid the reach of § 1342. It is the defendant's use of a name other than his own to obscure his identity that constitutes the offense. *United States* v. *Etheredge*, 140 F. 376, 380 (N.D. Ala. 1905). Prosecutions for fraudulent misuse of credit cards have typically involved the use of names of real persons. See, *e.g.*, *United States* v. *Bonanno*, 430 F.2d 1060 (2 Cir.), *cert. denied*, 400 U.S. 964 (1970); *United States* v. *Chason*, 451 F.2d 301 (2 Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); *United States* v. *Madison*, 458 F.2d 974 (2 Cir.), *cert. denied*, 409 U.S. 859 (1972).

v. *Kyle*, 257 F.2d 559 (2 Cir. 1958), *cert. denied*, 358 U.S. 937 (1959); *United States* v. *Baren*, 305 F.2d 527 (2 Cir. 1962); *Atkinson* v. *United States*, 344 F.2d 97 (8 Cir.), *cert. denied*, 382 U.S. 867 (1965); *cf. United States* v. *Ellicott*, 336 F.2d 868 (4 Cir. 1964).

IV. *Alleged receipt of inadmissible hearsay*

Two complaints are made with regard to the receipt of allegedly inadmissible hearsay.

The first, relating to certain statements of Kay to the notary, need not detain us long. Apart from the point that there may well have been sufficient evidence to link Kay with the conspiracy under the standard prescribed in *United States* v. *Geaney*, 417 F.2d 1116, 1119-20 (2 Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970),[15] our attention has not been called to any statement of Kay's that was received to prove the truth of a matter asserted in the statement. Instead, his remarks served only to prove his knowledge of facts otherwise established or to shed light on his several transactions with the notary. See *United States* v. *Annunziato*, 293 F.2d 373, 376-77 (2 Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Costello*, 352 F.2d 848, 853-55 (2 Cir. 1965), *rev'd on other grounds sub nom. Marchetti* v. *United States*, 390 U.S. 39 (1968); McCormick,

[15] This is an appropriate place to note and reject the argument that the Government's proof failed because the excess of the amount paid by Planinvest over that received by Dr. Hori and Mtre. Solomon may have gone to Kay, rather than to the defendants. If Kay was a fellow conspirator, that would be immaterial. Moreover, there was ample evidence that the large sums remaining in the Nassau branch of FNCB were accessible to Frank, Hemlock and Hoffer rather than to Kay, and were removed by them.

Evidence § 249 (Cleary ed. 1972). No matter how often appellate courts and commentators seek to explicate the true nature of the rule, the motion that any reference to a conversation constitutes hearsay, inadmissible unless within an exception, dies exceedingly hard.

A more troubling question concerns the admissibility against Hemlock and Hoffer of the admissions by Frank and Miller at their final meeting with Mrs. Dominguez. The serious argument here is not that there was inadequate proof *aliunde* of the conspiratorial relation among the four men but that the admissions were not in furtherance of an on-going conspiracy.[16]

We have little difficulty in holding that despite *Krulewitch* v. *United States,* 336 U.S. 440 (1949), *Lutwak* v. *United States,* 344 U.S. 604 (1953), and *Grunewald* v. *United States,* 353 U.S. 391 (1957), the conspiracy to defraud Mrs. Dominguez was continuing as late as September 24. The basis of *Krulewitch* was "that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her," 336 U.S. at 442; the Court rejected the argument "that even after the central criminal objectives

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[16] The Government claims that no objection was made to the admission of this testimony; the defendants counter that the judge had ruled that he would provisionally admit all declarations of alleged conspirators subject to a subsequent blanket motion to strike evidence the admission of which was not warranted under the conspiracy excepton and that such a motion was made. While we appreciate the judge's desire to expedite the trial, we are not sure of the wisdom of departing so far from the requirement of specific and reasoned objection to a particularly crucial piece of evidence.

of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment [from the government] as its sole objective." 336 U.S. at 443. *Lutwak* and *Grunewald* added nothing more, although Mr. Justice Harlan's opinion in the latter is useful for its explication, 353 U.S. at 402:

> Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.

Here the conspiracy could well be regarded as not simply to perpetrate the two frauds here described. The evidence suggests that the conspirators thought they had a good thing in Mrs. Dominguez and would defraud her further if the opportunity arose. More important, the conspiracy even as to the two parcels was not complete so long as Mrs. Dominguez was threatening to get the money back.

There is more of a problem in holding that the declaration was in *furtherance* of the conspiracy, a requirement to which we have adhered. *United States* v. *Annunziato supra,* 293 F.2d at 380. If Frank and Miller had simply admitted the overpayment, we would see no basis for such a ruling. However, they went beyond this and offered an explanation which they apparently thought with however little basis would turn away Mrs. Dominguez or at least diminish her ire and the consequent zeal of her pursuit. In any event, although no one has made the point, we do not see why the admission of the diversion of Planinvest's funds to an unauthorized purpose was not a declaration against pecuniary interest by a declarant unavailable to testify, see McCormick, Evidence §§ 276, 277, 280 (Cleary ed. 1972).

Appendix A

V. *Receipt of testimony concerning Bahamian bank transactions*

The Government's case rested heavily on the testimony of Latvis, former manager of the FNCB Nassau branch who is no longer with the Bank and his secretray Miss Reilly now employed at its branch in Tarrytown N. Y. Appellants contend that because of the Bahamian Bank Secrecy Act the court should not have permitted Latvis or Miss Reilly to testify about the various banking transactions at the FNCB Nassau branch. The Bahamian Bank Secrecy Act provides under penal sanction, that

> Except for the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court of competent jurisdiction within the Colony or under the provisions of any law, no person shall disclose any information relating to the affairs of a bank or of the customers of a bank which he has acquired in the performance of his duties or the exercise of his functions under this Act.

The district court authorized the submission to a Bahamian court of an International Request for Judicial Assistance, contemplated by the Bahamian Act, for the disclosure of the records here relevant. Justice J. A. Smith granted the request on May 31, 1973, but his order was stayed pending an appeal but not later than June 30. Before that date the trial here was concluded.

We do not read our decisions dealing with the application of bank secrecy laws to American banks whose foreign branches are governed thereby, *First National City Bank* v. *I.R.S.*, 271 F.2d 616 (2 Cir. 1959), *cert. denied,*

361 U.S. 948 (1960); *Application of Chase Manhattan Bank*, 297 F.2d 611 (2 Cir. 1962); *United States* v. *First National City Bank*, 396 F.2d 897 (2 Cir. 1968); and *Trade Development Bank* v. *Continental Ins. Co.*, 469 F.2d 35, 39-42 (2 Cir. 1972), to go as far as appellants urge. In *Application of Chase Manhattan, supra*, the case most favorable to the appellants, we simply declined, on the facts there presented to use the process of our courts to force an American bank doing business in a foreign country to take action in that country which would constitute a crime. It is not at all clear that under the principles normally applied in the interpretation of criminal statutes the revelations by Mr. Latvis and Miss Reilly in New York would constitute a crime under Bahamian law. Even if it would no principle of accommodation requires the United States to seal the lips of American citizens testifying to facts within their knowledge concerning activities of other Americans in a foreign country as part of a scheme to violate American criminal law simply because that country chooses to throw a veil of secrecy around bank accounts except insofar as their courts may see fit to lift it. We thus have no occasion to consider the Government's contention that the balance struck in the cited decisions requires reconsideration favorable to it because of enactment of The Bank Secrecy Act, 84 Stat. 1114.

VI. *The use of an interpreter*

The question of Mrs. Dominguez' need for a Spanish interpreter had been discussed at a pretrial hearing. The Government represented that it would establish such a need at the trial. Counsel for one of the defendants objected on the ground that Mrs. Dominguez was fluent in

English and that permitting her to have the services of an interpreter would give her an undue advantage in cross-examination. The judge refused to conduct an evidentiary hearing on Mrs. Dominguez' proficiency in English saying that in all probability he would permit an interpreter to stand by and allow Mrs. Dominguez to use her when and if needed.

Over objection an interpreter was sworn at the beginning of the trial. After satisfying himself that Mrs. Dominguez spoke and understood English, the judge decided to take her testimony in that language but advised her to communicate with him if she needed a Spanish interpreter. The direct examination was conducted almost entirely in English. However on cross-examination the witness on several occasions resorted to the interpreter without prior authorization from the court. Over repeated objection by defense counsel the interpreter answered roughly a dozen questions for her during her day-long cross-examination.

We are not altogether happy about the manner in which this matter was handled. The reason initially given by the Government for having an interpreter, that Mrs. Dominguez speaks Spanish "nearly 70 per cent of the time," seems to backfire; if the Government meant that she spoke English 30 per cent of the time, this is quite a lot. Its argument that "as early as the fifth page of direct examination, it was clear that an interpreter would be periodically required" is rather disingenuous. The interpreter was there required only to help Mrs. Dominguez explain that a bank account opened by her mother on her attaining 21 was a "savings account." She went on for 40 pages without requiring further assistance. On the second occasion she relied on the interpreter simply to help her

describe Frank and Miller's "assassination" explanation at the final meeting. She then concluded her direct examination without further need of the interpreter's aid. We assume defendants would have raised no objection to the use of an interpreter solely for technical terms or five syllable words. Certainly such limited use of an interpreter would have been perfectly proper. The defendants' point is different. They claim that if Mrs. Dominguez could do that well on direct examination, there was no need for the more extensive reliance on the interpreter that occurred on cross.

The argument is not quite so strong as it seems. Mrs. Dominguez had appeared before the grand jury and had doubtless gone over her testimony with the prosecutor. Her relative familiarity with the lines taken on direct examination almost certainly enhanced her ability to understand the questions and respond in English. The surprise of cross-examination is a different matter. Still we are disturbed by her occasional resort to the interpreter when a cross-examiner seemed to approach at least a minor success. Here again see note 16 the judge may have been the victim of his ground-rule forbidding counsel to state the basis for their objections without special permission; counsel might have suggested such courses as a slackening of speed rephrasing of questions by the interrogator or the court or enforcement of the judge's directive that Mrs. Dominguez request permission to use the interpreter on each occasion when the need arose. On the other hand, the jury observed what was going on and defense counsel were free to comment on it in their summations, as one of them did. Counsel have cited no case where a conviction has been reversed because of the improper use of an interpreter, although, despite *Perovich* v. *United States*,

205 U.S. 86, 91 (1907), there have been some reversals for refusal to appoint one, obviously a stronger case. See 3 Wigmore, Evidence § 811, at 277-78 & n. 2 (Chadbourn rev. 1970); *United States* v. *Desist*, 384 F.2d 889, 901-03 (2 Cir. 1967), *aff'd without discussion of this point*, 394 U.S. 244 (1969); *United States ex rel. Negron* v. *New York*, 434 F.2d 386, 389-90 (2 Cir. 1970); *United States* v. *DiazBerrios*, 441 F.2d 1125, 1127 (2 Cir. 1971). All things considered, we find no abuse of discretion by the judge sufficiently prejudicial to require a reversal.

VII. *The instructions and refusal to instruct concerning the effect of a conviction on Mrs. Dominguez' civil suit*

At the conclusion of his charge to the jury, Judge Pollack asked the parties to submit exceptions to the instructions he had given. After the defendants had raised several objections, he commented, "You know, I am a little disturbed over the fact that you are sitting here with these things that you had for some days." The Government he pointed out, had submitted elaborate requests to charge, and a supplementary request relating to the relationship between a criminal conviction and a subsequent civil suit. He noted that the defendants had neither submitted requests to charge nor objected to any of the Government's requests prior to his delivering the charge. Not surprisingly the judge's instruction on the effect of a conviction on Mrs. Dominguez' civil suit was heavily influenced by the Government's request.

The judge began by pointing out, quite correctly, that "The pendency of a private civil lawsuit referring to the transactions mentioned here is no defense to this indict-

ment" and by explaining the different functions of criminal prosecutions and civil suits. He went on however, to say:

> Thus, a conviction in a criminal action does not support a subsequent civil judgment in a case of this sort based on the same transactions because each of such proceedings has a totally different object. In addition, they are dissimilar in terms of parties, rules and procedures.
>
> Where defendants in a criminal prosecution of this kind are sued in a civil trial based on the same transactions, the two proceedings are completely unrelated, except only in respect of whether the civil matter may bear on the issue of credibility. That is to say, if the defendants are convicted in the criminal action, the plaintiffs in the civil suit will still have to prove their entire case for damages before a new jury or judge and could in no way rely on defendant's prior conviction to sustain their claim.

He later gave a fairly detailed "interest" charge with respect to credibility, instructing the jury as follows:

> In weighing the testimony of the witness, you can consider their relationship to the Government or to the defendant, as the case may be, and any bias or interest in the outcome of the case. . . .
>
> Interest creates a motive for false testimony. The greater the interest, the stronger the motive for false testimony. In appraising credibility you may take that fact into consideration. However, it by no means follows that simply because a person

> has a vital interest in the end result, he or she is not capable of telling a truthful, candid and straightforward story.
>
> It is for you to decide to what extent, if at all, any interest of the witness has affected or shaded the testimony.

When the time came for making objections, trial counsel for Hoffer excepted "to what was the Government's supplementary charge with respect to the civil lawsuit and the language used by the Court." While this alone would have been too general, counsel for Frank amplified it, saying that

> I think that the outcome of the criminal case is definitely a matter that can be related to the civil case in the sense that if there is a conviction, the jury's verdict could be deemed to be res judicata in the civil suit even though you have different parties on the same subject matter and where the evidence would be identical.

After counsel elaborated further on this point, the judge noted that he had given "a very strong interest charge." Counsel conceded this and on that account withdrew "any exception to the statement that the civil suit will be no defense—", at which point the judge interrupted. It may be that if he had not, counsel would also have withdrawn the objection to the remarks that "a conviction in a criminal action does not support a subsequent civil judgment in a case of this sort based on the same transactions," that "the two proceedings are completely unrelated, except only in respect of whether the civil matter may bear on the issue of credibility," and that Mrs. Domniguez "could

in no way rely on defendants' prior conviction" in her civil suit; but we cannot find that any such withdrawal occurred. The issue is academic in any event since counsel for Hemlock then requested that the judge charge, "in connection with the civil suit . . . that the jury may consider the question of motive or interest of such witness or party because she stands to gain something in the event of a conviction in this case." In response to this, the judge gave an additional instruction[17] which does not seem to have added or subtracted anything.

Defendants' claim is that, in a diversity action in the Southern District of New York, the court would be bound to follow New York law on the collateral estoppel effect of a criminal conviction in a subsequent civil suit by a private person. The highest court of New York, they note, has recently held that under modern principles a criminal conviction is conclusive in any subsequent civil action as to any issues necessarily determined against the defendants in the criminal case, *S.T. Grand, Inc.* v. *City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938 (1973) (federal judgment convicting plaintiff corporation and its president of bribing City Water Commissioner precludes relitigation of validity of ensuing contract), and that the quoted instructions were thus in error.

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[17] "Now, I believe I have sufficiently charged you on the issues of interest and motives and the things that you have to keep your eye on and what you are really here to decide, and in an excess of caution I will say to you that there is no doubt that Mrs. Dominguez has a civil suit pending. I think I have sufficiently indicated to you what the relationship is between that suit and this, other than the fact that naturally she is a litigant and has an interest in that civil suit, and you may consider her testimony accordingly."

The Government challenges defendant's legal position.[18] Relying on *Kern* v. *Hettinger,* 303 F.2d 333, 340 (2 Cir. 1962), it argues that the question of the effect of convictions in this case in a civil suit in a federal district court is one of federal law and, implicitly, that it should be decided in the negative.

We do not accept either branch of the Government's argument. *Kern* v. *Hettinger, supra,* held only that whether a dismissal in a diversity action by a federal district court in California was to be read as being with or without prejudice must be determined in accordance with F.R. Civ. P. 41 rather than by the California state rule. Citing *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.,* 356 U.S. 525 (1958), the court ruled that in a clash between state law principles and the Federal Rules of Civil Procedure, the Federal Rules would prevail. See *Hanna* v. *Plummer,* 380 U.S. 460 (1965). The *Kern* case would be relevant if, but only if, some competent federal authority had decreed that a federal criminal conviction should not have collateral estoppel effect in private civil litigation. Since we know of no such decree, we see no reason why the district court seized of Mrs. Dominguez' diversity action should not endeavor to reach the same results as would a New York court sitting "a block away". *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 109 (1945). See *Berner* v. *British Commonwealth Pacific Airlines, Ltd.,* 346 F.2d 532, 539-40 (2 Cir. 1965) *cert. denied,* 382 U.S.

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[18] The Government has not sought to distinguish *Grand* on the basis that there collateral estoppel was being used by New York City defensively whereas Mrs. Dominguez would be using it offensively. In view of the New York court's earlier decision in *B. R. De Witt, Inc.* v. *Hall,* 19 N.Y.2d 141, 278 N.Y.S.2d 596 (1967), the failure to raise this point seems to have been well-advised.

983 (1966); *Breeland* v. *Security Insurance Co. of New Haven*, 421 F.2d 918, 921 (5 Cir. 1969).

Even if the question of the effect of a conviction on relitigation of the fraud in Mrs. Dominguez's civil suit were to be determined by federal law, our abandonment of the mutuality requirement in *Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2 Cir.) *cert. denied*, 377 U.S. 934 (1964); see also *United States* v. *Webber*, 396 F.2d 381 (3 Cir. 1968); *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451 (5 Cir.) *cert. denied*, 404 U.S. 940 (1971); *Bernhard* v. *Bank of America National Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942), now approved by the Supreme Court so far as concerns defensive use of collateral estoppel, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), would lead us to hold that a conviction here will operate as collateral estoppel in favor of Mrs. Dominguez in her civil suit, although neither *Zdanok* nor *Blonder-Tongue* involved the criminal-civil interplay. It is true, as the Government suggested at argument, that such a holding may subject complaining witnesses in federal criminal trials to more severe attacks on credibility than would otherwise be the case. Arguably, and perhaps more seriously, it provides too tempting a reward for overstatement or even perjury. While such fears are not utterly without basis, we think they are overcome by the desirability of a rule that a fact once established, after full and fair trial, beyond a reasonable doubt, should not have to be relitigated in a context where a preponderance of the evidence is all that is required. As the Fifth Circuit noted in *Breeland* v. *Security Insurance Co. of New Haven*, *supra*, 421 F.2d at 922, citing many cases, in attempting to predict a decision by the Supreme Court of Louisiana, "The number of jurisdictions holding that a criminal conviction precludes litiga-

tion of the same issue in a civil suit is ever increasing." We see no reason why federal courts should not follow the general trend—a trend which they have played a not inconsiderable part in bringing about.

It does not follow, however, that a judge must deliver a lecture on the law of issue preclusion in charging a jury with respect to the credibility of a complaining witness who has instituted a civil suit. A full statement of the conditions on the application of collateral estoppel and the limitations on its scope would be more likely to confuse than to enlighten. It would suffice to say that a conviction could operate to the advantage of the plaintiff in the civil suit, or, as counsel for Hemlock requested, that the witness "stands to gain something in the event of the conviction in this case." In determining whether the charge as given not only was error but requires reversal, instructions like these afford the appropriate benchmark.

While the distance between the benchmark and the instructions that were given was still substantial, we do not think this single slip requires reversal under the principles with respect to errors not of constitutional dimensions laid down in *Kotteakos* v. *United States*, 328 U.S. 750, 761-65 (1946).[19] The judge did not misinform the jury as to the elements of the crimes or as to anything relating to the defendants themselves. His error related

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[19] Although the "harmless error statute construed in *Kotteakos*, § 269 of the Judicial Code, see 328 U.S. at 757, has been replaced by 28 U.S.C. § 2111, the views expressed in *Kotteakos* remain authoritative. See *United States* v. *Kahaner*, 317 F.2d 459, 485 (2 Cir.), *cert. denied*, 375 U.S. 836 (1963); *United States* v. *Birnbaum* 373 F.2d 250 (2 Cir.), *cert. denied*, 389 U.S. 837 (1967); 3 Wright, Federal Practice and Procedure (Criminal) § 853-54 (1969).

only to the degree of discount to be applied in evaluating the testimony of an adverse witness, albeit an important one, with respect to whom he had already given a full "interest" instruction. The jury had surely gotten the idea that Mrs. Dominguez was no longer a friend of the defendants and that she wished them ill. The degree of difference a charge like that sought by Hemlock's attorney would have created in weighing Mrs. Dominguez' credibility, let alone in determining the defendants' guilt, is too small to warrant a reversal. Our conviction "is sure that the error did not influence the jury, or had but very slight effect." 328 U.S. at 764.

Although content to rest decision on that basis, we add a word from which counsel could profit in the future. The course that defense counsel pursued in raising this objection to the court's charge seriously weakens their claim of prejudicial error. While counsel can "protect the record" for appellate review simply by objecting to instructions at the conclusion of the judge's charge, that is a poor way to proceed in a matter such as that here under discussion. The judge might reasonably be reluctant to submit a supplemental instruction or correct what he perceives to be minor inaccuracies in his earlier charge for fear that doing so would draw undue attention to the new instruction, or that the jury might be confused in attempting to determine what was withdrawn and what was left of the original charge. This case provides a good illustration of the dilemma in which the deferral of defense objections on a point raised by the Government's requests to charge can place a trial judge. With the jury ready to retire, he was suddenly forced to make a quick determination on a difficult point of law without the aid of any authority except that cited in the Government's request. Even if he had felt that there was merit in the defendants' point, he

would still have to decide on the spot how much of their suggested charge to adopt and how to deliver the supplemental charge in a manner that would convey its proper weight to the jury. Here, for example, a strong supplemental charge indicating that Mrs. Dominguez had a great deal to gain from the conviction of the defendants might well have suggested to the jury that the judge had had second thoughts about Mrs. Dominguez' credibility and now deemed her testimony likely to have been seriously distorted. If we thought the error more serious than we do, we would have to consider whether defendants should be allowed to secure a retrial because of an error which, though they did not invite, they had failed to take effective measures to prevent.

We have considered the few other points raised by defendants but do not believe them to have sufficient merit to warrant discussion.

The convictions are affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of February one thousand nine hundred and seventy-four.

Present: HON. HENRY J. FRIENDLY
HON. PAUL R. HAYS
HON. JAMES L. OAKES
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a STEVE MILLER, a/k/a STEPHEN BERMAN, MAURICE S. HERBERT, and A. ARTHUR KAY, a/k/a AARON ARTHUR KLIANS KAY,

Defendants,

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, STEPHEN BORGMAN a/k/a STEVE MILLER, a/k/a STEPHEN BERMAN, HARRY HOFFER,

Defendants-Appellants.

73-2408; 73-2384; 73-2425; 73-2495

Appendix B

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgments and order of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

APPENDIX C

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of April, one thousand nine hundred and seventy-four.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HERBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay,

Defendants,

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, and STEPHEN BORGMAN, a/k/a Stephen Berman, a/k/a Steve Miller,

DOCKET NO. 73-2384

Appendix C

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants (Alfred J. Hemlock, and Harry Hoffer), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

Appendix C

Order of Court of Appeals Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of April, one thousand nine hundred and seventy-four.

Present: HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
Circuit Judges.

Docket No. 73-2384

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN JOSEH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a STEVE MILLER, a/k/a STEPHEN BERMAN, MAURICE HERBERT, and A. ARTHUR KAY, a/k/a AARON ARTHUR KLIANS KAY,

Defendants,

JOHN JOSEPH FRANK, STEPHEN BORGMAN, a/k/a STEVE MILLER, a/k/a STEPHEN BERMAN, HARRY HOFFER, ALFRED J. HEMLOCK,

Defendants-Appellants.

Appendix C

A petition for a rehearing having been filed herein by counsel for the appellants (Harry Hoffer and Alfred J. Hemlock)

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX D

Statutes Involved

18 U.S.C. §§ 371, 1341, 1342, 1343, 2314

§ 371. Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1341. Frauds and Swindles

Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by

mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both

§ 1342. Fictitious name or address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1343. Fraud by Wire, Radio, or Television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Appendix D

§ 2314. Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to advise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses representations or promises transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Appendix D

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

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358-809-74——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1849

ALFRED J. HEMLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1850

HARRY HOFFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of unlawful transportation of stolen money in interstate commerce, in violation of 18 U.S.C. 2314 (four counts), use of fictitious names in carrying out a mail fraud scheme, in violation of 18 U.S.C. 1342 (two counts), mail fraud, in violation of 18 U.S.C. 1341 (two counts), and conspiracy to commit the above crimes, in violation of 18 U.S.C. 371 (one count). Petitioners were sentenced to con-

current terms of four years' imprisonment (Hemlock) and two years' imprisonment (Hoffer) on the conspiracy, transportation and false name counts, and concurrent one-year terms on the mail fraud counts, to run consecutive to the other counts; in addition, Hemlock was fined $10,000. The court of appeals affirmed (Pets. App. A, pp. 1a–34a; 494 F.2d 145).

The pertinent evidence has been set forth in the opinion of the court of appeals and in our opposition to the petitions for writs of certiorari filed by co-defendants Stephen Borgman and John J. Frank (Nos. 73–1603 and 73–1674). Briefly, the evidence showed a fraud perpetrated on Mrs. Marie Trujillo Dominguez, the daughter of the former leader of the Dominican Republic. Following her father's assassination in 1961, Mrs. Dominguez, then aged 21, moved to Spain, where she remained until 1967 (Tr. 182a–185a).[1] Her substantial holdings were maintained in the names of a number of corporations, particularly Planinvest, a Luxembourg corporation.

In the summer of 1967, Mrs. Dominguez traveled to the United States. On arrival in New York City, she was met by co-defendant Frank, a Washington, D.C. attorney whom she had known for years (Tr. 341a, 344a). Frank introduced Mrs. Dominguez to co-defendant Borgman who used the name Miller.

Frank acted as a fiduciary for Mrs. Dominguez. On his advice, Mrs. Dominguez opened a personal check-

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[1] "Tr." refers to the trial transcript, contained in the two-volume Appendix in the Court of Appeals, which was lodged with the Clerk of this Court when we filed our brief opposing the certiorari petitions of Borgman and Frank. Pagination is that of the Appendix.

ing account at the Bank of New York on August 14, 1967 (Tr. 188a). He also introduced her to petitioner Hemlock, a New York attorney.

In September, 1967, Hemlock and his law partner, petitioner Hoffer, began advising Mrs. Dominguez concerning a property settlement with her husband. They learned that she had two income-producing assets: mutual funds worth $1 million and a certificate of deposit in a London bank worth $2.4 million. Both assets were in the name of Planinvest. On September 19, Hemlock and Mrs. Dominguez arranged for the London bank's interest payments to be remitted thereafter to her Bank of New York account, and for all communications regarding this account to be sent to Hemlock.

One month later, on Frank's advice, Mrs. Dominguez opened an account in the name of Planinvest at the New York branch of the Bank of London and South America. Frank and Borgman signed signature cards along with Mrs. Dominguez, and the bank statements were to be sent to Frank's law office in Washington. Thereafter, Frank and Borgman took over the day-to-day financial affairs of Mrs. Dominguez; they made deposits and prepared checks for her signature, generally presenting a number at one time for her to sign. Sometimes the amounts on the checks were left blank when Frank or Borgman presented them for signature. On these occasions Mrs. Dominguez was told that the exact amount to be paid was not known (Tr. 210a, 265a).

In the fall of 1967, Frank and Borgman began to recommend to Mrs. Dominguez that she invest in foreign land—Canada in particular—to avoid a loss if

the dollar were devaluated. Mrs. Dominguez agreed to listen to proposals, but specified that she would not consider a purchase over $200,000. This limited acquiescence provided a basis for the fraudulent purchase of two separate parcels of land, valued at less than $90,000, for which Mrs. Dominguez paid $1,140,000.

THE FIRST FRAUDULENT PURCHASE

On January 9, 1968, co-conspirator Arthur Kay purchased a parcel of land in surburban Montreal for $79,000. The deed for the land (largely undeveloped marsh) was executed in the office of Elie Solomon, a "notary."[2] Solomon was instructed to retain the deed pending payment of the $79,000; Kay further informed Solomon that he would be reselling the land to a Bahamian corporation, which in turn would immediately convey it to a European corporation. Later that day either petitioner Hemlock or Hoffer called Solomon to inform him that the subsequent conveyances would be completed in Nassau. Solomon advised the caller that it would be necessary to obtain a resolution from the ultimate purchaser authorizing the purchase. The following day Solomon, Kay and two others flew to Nassau, after first landing in New York City, where they had been joined by Hemlock. Simultaneously, Borgman obtained a certified Planinvest check, signed by Mrs. Dominguez, in the amount of $778,500. Hemlock evidently had this check when he met the Montreal party at the airport and accompanied them

[2] In Canada a notary is a lawyer who specializes in real estate conveyances.

to Nassau. Hoffer met the others at the Nassau airport.

The following morning, January 11, the parties in Nassau met to complete the transfer of the Canadian property. First the property was conveyed from Kay to Columbia Corp., Ltd., a Bahamian corporation represented by a local attorney and his secretary, both of whom affixed their signatures to the deeds. The next step was to be a transfer from Columbia to Planinvest. However, this conveyance was delayed by Solomon because of the absence of any official resolution empowering anyone to execute a deed on behalf of Planinvest; during this interim Hoffer, in Hemlock's presence, informed Solomon that Planinvest would be represented by one Herbert Leftkowitz, but that the deed itself should refer to Planinvest in care of Frank at his Washington office. Hoffer also promised to send Solomon copies of the charters of Columbia and Plaininvest. That afternoon Leftkowitz arrived in possession of what purported to be an appropriate resolution. The signature of Mrs. Dominguez on that resolution was "authenticated" by Hemlock or Hoffer (Tr. 546a). Because the original $79,000 had not yet been paid, the notary still refused to relinquish the deeds, and the meeting was adjourned.

That same day petitioners opened two bank accounts in Nassau, in the names of Columbia Corp., Ltd. and Splindian Investments, Ltd., listing three required signatures: Hemlock, Hoffer and Frank. The $778,500 Planinvest check was then presented for deposit in the Columbia account. The bank refused to allow withdravals on the deposit until the check had

cleared the Federal Reserve Bank in New York City, a procedure usually requiring eight days. At petitioners' suggestion the bank dispatched one of its secretaries to transport the check by air to New York the same day, thereby permitting the use of the funds the very next day. Petitioners made the arrangements for the secretary's flight.

On January 12, the $778,500 check was processed through the New York Federal Reserve Bank, and the monetary aspects of the real estate transaction were completed when arrangements were made to transfer $79,000 to the notary's trust account. Either Hemlock or Hoffer paid Solomon $500 as compensation for his services. They then returned to New York. The next day, on his stopover in New York en route to Montreal, by pre-arrangement Hoffer met Solomon at the airport and received a "special" copy of the deed from Columbia to Planinvest. This copy, later given to Mrs. Dominguez, did not contain the resolution empowering Leftkowitz to make the purchase on behalf of Planinvest; rather, the copy merely referred to the existence of a "duly authorized" resolution without further identification (Government Exhibit 8). On January 15 Hoffer mailed Solomon a copy of Columbia's charter, showing that it had been incorporated in November 1967.

In late January 1968, Mrs. Dominguez was made aware of the land purchase (but not the purchase price). She could not recall having signed any check to pay for the land. Frank assured Mrs. Dominguez that the purchase was proper and within the bounds she had set.

THE SECOND FRAUDULENT PURCHASE

A week after the first transaction, Kay and Solomon discussed the sale of a portion of a tract partially owned by Solomon, for $8,000. Kay indicated that the order of transfer to Planinvest would be similar to the first transaction, with one Denise Comeau replacing Kay and Splindian Corporation replacing Columbia in the chain of title. Meanwhile, Solomon received a copy of the Planinvest charter from Hoffer via the mails; he was disturbed that the charter did not authorize Planinvest to buy and sell land as required by Canadian law, and asked for a copy of the Luxembourg laws that might bestow such power. Hoffer never furnished any such documents.

On February 2, 1968, Borgman presented for certification to a New York bank a Planinvest check in the amount of $361,500, payable to Splindian Investment, Ltd. The check was certified and returned to Borgman. On February 4 the necessary parties, including Solomon, Kay, and Miss Comeau, flew from Montreal to New York City, met Hemlock there, and then flew to Nassau, where Hoffer was waiting. The following day Leftkowitz appeared and the series of deeds were executed in a course similar to the first transaction. That same day petitioners deposited the $361,500 check in the Splindian account which they had previously opened in Nassau; later, Kay paid Solomon $10,856 for the land and received a $2,856 rebate.

In February or March, 1968, Mrs. Dominguez' former financial secretary, Arcadio Santana, returned to her

employ and assumed control of her finances. Santana learned of the exact amount paid for the first parcel of land and reported the amount to Mrs. Dominguez. Confronted with this information, Frank once again assured Mrs. Dominguez that the land was worth the price paid. Shortly thereafter, petitioners and Frank went to Nassau and directed the bank manager to break the time deposits in the Splindian and Columbian accounts and pay them in cash. The manager withdrew between $300,000 and $600,000 which he gave to petitioners and Frank.

Not satisfied with Frank's assurance as to the value of the first Canadian parcel, Mrs. Dominguez met with Hemlock in June, 1968. Unaware of his role in the transaction, Mrs. Dominguez gave Hemlock the "special" copy of the deed and requested that he investigate the conveyance. During the summer of 1968, Mrs. Dominguez met with petitioners on several occasions. At no time did they reveal their role in the transactions. Then Santana was sent to Montreal to make his own investigation; there he learned of Hemlock's participation. At a meeting with Hemlock, Mrs. Dominguez reported Santana's revelations; Hemlock suggested that someone had been using his name in an unauthorized manner. Mrs. Dominguez also stated that she had learned that the property was not worth what she had paid for it. Hemlock responded by agreeing to arrange a meeting with Frank and Borgman.

The meeting occurred at Hemlock's law office on September 24, 1968. There, Frank admitted that the land was not worth the purchase price. He explained

that the difference had been used to pay off the Central Intelligence Agency because of Mr. Dominguez' alleged involvement in a plot to kill one of her father's assassins. Neither Frank nor Hemlock disclosed to Mrs. Dominguez any of the details of either land transaction. In fact, Mrs. Dominguez had never heard of Herbert Leftkowitz, the person who had acted as Planinvest's representative in Nassau (Tr. 234a). She regarded Frank's explanation as preposterous.

Most of the issues presented by petitioners also have been raised in the companion petitions filed by co-defendants Frank and Borgman, and have been dealt with in our Brief in Opposition in Nos. 73–1603 and 73–1674.

1. As noted in our prior brief, the concurrent sentence doctrine makes it unnecessary for the Court to consider petitioners' attack upon their conviction for violating the fictitious names statute, 18 U.S.C. 1342.[2] *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, as stated previously and contrary to petitioners' contention, that statute reaches the instant situation where detection of the fraud is handicapped by the employment of several straw parties using trade names, even though such parties are correctly identified; nothing in the legislative history of the statute supports an opposing view.

[2] We recognize that in addition to the prison sentence a general fine of $10,000 was imposed upon petitioner Hemlock. However, there is little likelihood that the amount of the fine was affected by the Section 1342 convictions, since the fictitious names statute authorizes a maximum fine of only $1,000, whereas the conspiracy count and the four Section 2314 counts authorize maximum fines of $10,000 for each violation.

2. Petitioners were properly convicted of mail fraud. In our previous brief, in discussing 18 U.S.C. 1341, we detailed the importance of the use of the mails to the fraud. The two counts of mail fraud on which petitioners were convicted involved the letters sent by Hoffer to Solomon, the Canadian notary, on January 15 and January 25, 1968, each containing corporate records which Solomon required in order to form an opinion as to the legality of Planinvest's attempted purchase of the first parcel and the prospective purchase of the second. Since the two mailings were necessary in order to obtain the notary's acquiescence, they were more than incidental to the fraudulent scheme. Unlike the situation in *United States* v. *Maze*, 414 U.S. 395, the mailings here were made by a co-defendant, for the purpose of executing the fraud. Although Hoffer asserts that the mailings were made by him innocently in the ordinary course of his duties as an employee of a law firm representing a party to the legal transaction (Hoffer Pet. 18), the evidence detailed above, showing Hoffer's substantial involvement in the scheme, refutes his argument.

3. Petitioners adopt the argument of petitioner Frank in No. 73–1674 that the district judge erred in allowing two former employees of a Bahamian branch of an American bank to give testimony respecting bank transactions in the face of a Bahamian bank secrecy law. As we noted in our Brief in Opposition to Frank's petition, petitioners may well lack standing to contest the court's ruling that the two former bank employees were not covered by the Bahamian secrecy statute, since the bank's customers were two

corporations (Splindian and Columbia) and not petitioners. Moreover, as shown in our brief, petitioners have not demonstrated that the bank secrecy statute was intended to reach oral testimony unaccompanied by revelations of private bank records; and at all events, principles of comity do not require American citizens to refrain from testifying to facts within their knowledge in an American court concerning the activities of other Americans in a foreign country engaging in a scheme to violate American criminal law.

4. Like Frank and Borgman, petitioners attack the comment by Judge Friendly in the opinion of the court below (Pets. App. A, 15a–16a) that when a defendant has presented no case it may be reasonable for a jury to draw inferences from the prosecution's evidence that would be impermissible if the defendant had supplied a credible exculpatory version. As we noted in our earlier brief, in context, this statement merely means that where, as here, the defense offers no evidence, the jury may well draw from the evidence adduced by the government reasonable inferences adverse to the defendants; and that had the defendants supplied a credible exculpatory version from any source—not limited to their own testimony—certain possible inferences might have been impermissible.

In any event, Judge Friendly's comment obviously had no effect on the proceedings at the trial stage. Petitioners do not attack the adequacy of the district judge's instructions on burden of proof, presumption of innocence, and the right to remain silent without inferences being drawn from such silence. Nor is there any error in the standard actually employed (and

enunciated) by the court of appeals in testing the sufficiency of the evidence. See Pets. App. A, 14a–15a; 494 F. 2d at 153. Accordingly, petitioners' attempt to elevate a passing comment by Judge Friendly to the status of constitutional error is invalid.

5. At trial, Mrs. Dominguez testified to her discovery of the activities of petitioners and their co-defendants. She then described her confrontation with co-defendants Frank and Borgman at Hemlock's law office, at which they admitted that the property purchased with her funds was not worth the price paid and explained that the difference had been used to pay off the Central Intelligence Agency. The conversation occurred in the presence of Hemlock; after Frank and Borgman had left the office, Hemlock also gave the explanation to Mrs. Dominguez' husband (Tr. 226a). No specific objections were made by any defendant to any of this testimony, nor was a request for a limiting instruction ever made thereafter by any party, even after the matter was briefly mentioned in the prosecutor's closing argument (Tr. 868a. See Pets. App. A, p. 20a, n. 16; 494 F. 2d at 155, n. 16).

On appeal, petitioners alleged that the district court should not have allowed Frank's statement to Mrs. Dominguez, made nine months after the second Canadian land transaction, to be admitted against them. Petitioners' attempt to magnify this incident into plain and reversible error is meritless for several reasons beyond their failure to seek an appropriate remedy at trial. First, the statement was not hearsay (as petitioners now contend), since it was not intro-

duced to prove the truth of the matters stated, *i.e.*, that the land was not worth its purchase price or that the price differential had been turned over to the CIA. See *United States* v. *Williamson*, 450 F. 2d 585 (C.A. 5), certiorari denied, 405 U.S. 1026. The statement was relevant to prove Frank's guilty knowledge. It cannot fairly be deemed to have been used by the jury to infer guilt on the part of Hoffer or Hemlock, neither of whom were present when the statement was uttered. In addition, the comments, placed in proper context in the lengthy trial, were not crucial to the government's proof of petitioners' guilt. The jury heard unchallenged testimony of petitioners' active participation in the two fraudulent real estate sales, including their attendance at the meetings in Nassau, their opening of the bank accounts at the Nassau bank and depositing of the checks obtained from Mrs. Dominguez without her knowledge of their inflated amount, and the subsequent removal of a large sum in cash from those accounts. In light of these circumstances, Frank's statement was not a significant part of the case against petitioners.

If hearsay, the declaration would have been admissible under the co-conspirator exception. As the court of appeals noted, the conspiracy was still in effect after the two real estate transactions had been consummated, since there was evidence of a willingness to make further fraudulent deals if the opportunity presented itself, and since petitioners were continuously involved in measures designed to prevent Mrs. Dominguez from recouping her money, such as

removing the funds from the Nassau bank through nontraceable cash withdrawals, concealing Hemlock's role, and defeating all attempts by Mrs. Dominguez to obtain the details of the transactions even after she discovered that the purchases had been made. Frank's statement to her, finally admitting that an overpayment had been made and offering the implausible explanation of payments to the CIA, certainly was intended to protect the success of the fraud by satisfying the curiosity of Mrs. Dominguez regarding the disposition of the excess funds. At that point, "[r]ather than attempting to cover his tracks [Frank] was making affirmative efforts to salvage what was left in the enterprise." *United States* v. *DeSapio,* 435 F. 2d 272, 284 (C.A. 2), certiorari denied, 402 U.S. 999; see *United States* v. *Etheridge,* 424 F. 2d 951, 964 (C.A. 6), certiorari denied, 400 U.S. 993, 1000. Accordingly, even assuming that it tended to prove petitioners' guilt, Frank's statement could properly have been considered by the jury.

6. Like Frank and Borgman, petitioners contend that the district judge erred in permitting Mrs. Dominguez to make selective use of an interpreter and in instructing the jury that a conviction in a criminal case would not support a judgment in a subsequent civil suit. Our Brief in Opposition in *Borgman* and *Frank* notes the court of appeals' conclusion that with regard to the use of an interpreter, "[a]ll things considered * * * [there was] no abuse of discretion by the judge sufficiently prejudicial to require a reversal," (Pets. App. A, p. 26a; 494 F. 2d at 158), and that

with regard to the instruction on the effect of a conviction upon the civil suit, the judge's failure to give an appropriate collateral estoppel instruction, if error, was not of constitutional dimension and did not warrant reversal under the appropriate harmless error test.

Petitioner Hemlock alleges, however, that the court of appeals erred in employing the harmless error test of *Kotteakos* v. *United States,* 328 U.S. 750, rather than the stricter standard of *Chapman* v. *California,* 386 U.S. 18.[4] To the contrary, since the error complained of was not of constitutional dimension, the court of appeals was not required to declare that it was "harmless beyond a reasonable doubt." *Chapman, supra,* 386 U.S. at 24. The standard of harmless error set forth in *Kotteakos* is still applicable to errors not affecting constitutional rights (*Kotteakos, supra,* 328 U.S. at 764–765):

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.

See also *United States* v. *Arias-Diaz,* 497 F. 2d 165, 171 (C.A. 5); *United States* v. *Panczko,* 429 F. 2d 683 (C.A. 7), certiorari denied, 400 U.S. 946.

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[4] Petitioner Hoffer's claim that the harmless error test was employed by the Second Circuit in resolving the interpreter question is erroneous (Hoffer Pet. 14–15). As noted, *supra,* the court of appeals held that the district judge did not abuse his discretion in this matter.

In any event, the instructional error was harmless even by the stricter *Chapman* standard. The error dealt with a collateral matter and the jury was already aware of Mrs. Dominguez' substantial interest in the outcome of the case. Nor did the defense offer a written version of the instruction they would have preferred (Rule 30, Fed. R. Crim. P.).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73—1849

ALFRED J. HEMLOCK,

Petitioner,

v.

UNITED STATES OF AMERICA.

No. 73—1850

HARRY HOFFER,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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ALFRED J. HEMLOCK,

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PETITIONERS' REPLY BRIEF

The filing of this reply brief has been delayed because of the Solicitor General's failure to effect a timely filing of his opposition briefs. He has disregarded the time limits set both in Rule 24(1) and in the August 27, 1974 letter from the Clerk, which requested that responses be filed "on or before September 11, 1974".

The Government has thus impeded the right of these petitioners promptly to bring to this Court's attention new considerations vitally affecting the propriety of granting certiorari.[1]

I.

Should action here be withheld until the *Parness* case is reached?

Chief among the new factors here presented is the filing of a petition for certiorari in *Parness* v. *United States,* No. 74-274, on September 13, 1974. The Court may wish to consider withholding action on the instant petitions until it reaches the *Parness* petition, which raises in a most dramatic fashion one of the critical issues in the instant cases —i.e., whether the Second Circuit committed constitutional error when it sanctioned the jury's drawing of otherwise impermissible inferences simply because the petitioners had not taken the stand and presented a "credible exculpatory version" of the alleged crime.

In the *Parness* case, the Second Circuit quoted and relied upon that portion of the opinion below that articulates this strange new constitutional doctrine. The *Parness* petition not only raises this matter as a question presented but notes (pp. 33-34) that this doctrine appears to be an extension and a perversion of a concept created by this Court in *Holland* v. *United States,* 348 U.S. 121, 138-139 (1954), and *Yee Hem* v. *United States,* 268 U.S. 178, 185 (1925).

This is far from what the Solicitor General has described (br., p. 12) as a "passing comment by Judge Friendly." It is a ruling and a precedent, already used in *Parness,* that

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[1] In this reply brief, unless otherwise specified, figures in parentheses followed by the letter "a" refer to the pages of the defendants' Joint Appendix in the Court of Appeals; references to "Pet." are to the Hemlock petition (No. 73—1849); and references to the Government's brief ("br.") are to its brief in opposition to the Hemlock and Hoffer petitions.

poses a serious threat to the right given a defendant not to have adverse inferences drawn against him by reason of his failure to testify in his own defense. It may be noted that, contrary to the Government's assertion (br., p. 11), the trial court here did not give any instructions with relation to petitioners' "right to remain silent without inferences being drawn from such silence." This problem obviously deserves review by this Court.

II.

The concurrent sentence doctrine is not a bar to this Court's consideration of any of the issues raised by petitioners.

Contrary to the Government's contention (br., p. 9), the concurrent sentence doctrine is not a bar to this court's consideration of the issue relating to 18 U.S.C. § 1342, the "fictitious name" statute.[2] Further, no claim is, or could be, advanced by the Government that that doctrine could possibly affect any of the other issues raised by petitioners.[3]

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[2] Petitioner Hemlock received concurrent sentences of four years each, and petitioner Hoffer concurrent sentences of two years each, on (a) Count 1 of the indictment, charging conspiracy, (b) Counts 2 through 5, charging substantive violations of 18 U.S.C. § 2314, and (c) Counts 6 and 7, charging substantive violations of 18 U.S.C. § 1342, the "fictitious name" statute. In addition, petitioners Hemlock and Hoffer each received separate sentences of one year each—to run concurrently with each other but consecutively to the other sentences—on Counts 12 and 13, charging substantive violations of the mail fraud statute, 18 U.S.C. § 1341. The trial court also imposed a fine of $10,000 on petitioner Hemlock, which, the court specifically recited, was *"to cover all counts"* (957a-958a; emphasis supplied).

[3] The issue relating to the mail fraud statute (Pet., pp. 19-21) bears directly on petitioners' convictions on Counts 12 and 13, on which they received separate sentences. The remaining issues, relating to the co-conspirators' declarations (Pet., pp. 8-12), the "harmless error" doctrine (*id.*, pp. 14-17), the effect of petitoners' failure to take the stand (*id.*, pp. 17-19), and the Bahamian bank secrecy statute (Frank Pet., pp. 16-19), affect petitioners' convictions on all the counts.

Thus, this Court has held that "there is no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed." *Benton* v. *Maryland*, 395 U.S. 784, 791. All that was held in *Barnes* v. *United States*, 412 U.S. 837, 848, fn. 16, on which the Government relies, was that it is discretionary with this Court to decide whether to review a case involving concurrent sentences.

In any event, the fine of $10,000 which was imposed on petitioner Hemlock was, by its terms, based on all the counts of which he was convicted, including the two counts charging violations of § 1342, and it is sheer speculation for the Government to suggest (br., p. 9, fn. 3) that "there is little likelihood that the amount of the fine was affected by the Section 1342 convictions." Furthermore, the Court of Appeals itself did not regard the issue relating to § 1342 as barred by the concurrent sentence doctrine; indeed, that court expressly stated that if the interpretation of § 1342 urged by petitioners were accepted, "there would have to be a reversal not only of the convictions under Counts 6 and 7 [charging substantive violations of § 1342] but perhaps also of the conviction on the conspiracy charge, Count 1, since the [trial] judge instructed that a finding of a conspiracy to violate § 1342 would warrant a conviction on the conspiracy count" (Pet., App. A, p. 17a).

In attempting to support the expanded reading accorded to § 1342 by the Court of Appeals, the Government asserts (br., p. 9) that "nothing in the legislative history of the statute supports an opposing view." It is clear, however, that nothing in the legislative history of the statute supports the broad interpretation applied by the Court of Appeals; certainly, the legislative history of the statute, to which the Government briefly refers in its brief in opposition to the separate petitions filed herein by co-defendants Borgman and Frank (Nos. 73-1603, 73-1674), has no bearing whatever on the issue here presented. Clearly, in such circumstances, the settled canon is here applicable that "a

criminal statute . . . must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States* v. *Enmons,* 410 U.S. 396, 411.

III.

As to the Court of Appeals' extension of the Federal hearsay exception relating to co-conspirators' declarations.

In an evident attempt to avoid meeting the issue as to the validity of the Court of Appeals' extension of the Federal hearsay exception relating to co-conspirators' declarations (Pet., pp. 8-12), the Government (br., pp. 12-13) urges (a) that the issue was not properly preserved for review in the trial court, (b) that the co-conspirators' declarations here involved did not actually constitute hearsay, and (c) that, in any event, such declarations were "not a significant part of the case" against petitioners. There is no merit whatever to any of these contentions, and it is significant that the Court of Appeals in no way attempted to rest its decision on any such grounds and in fact squarely rejected the Government's contention that the issue had not been preserved for review.

As the Court of Appeals pointed out (Pet., App. A, p. 20(a), fn. 16), the trial judge had early in the trial "ruled that he would provisionally admit all declarations of alleged co-conspirators subject to a subsequent blanket motion to strike evidence the submission of which was not warranted under the conspiracy exception" (195a, 203a, 217a-218a, 519a, 566a), and such a motion to strike was made by each defendant at the close of the Government's case (727a).[4]

[4] It may be noted that at an early point in the trial, counsel for petitioner Hoffer made a request of the trial court—which under the court's "ground rules" enured to the benefit of the other defendants (134a)—for "a limiting instruction" with reference to testimony which would not be admissible against a particular defendant unless justified under the rules relating to conspiracy; that the trial court stated it would "indicate at the proper time to what references the jury's attention should be drawn and to whom they apply"; but that the court never did so (203a).

Contrary to the Government's assertion (br., pp. 12-13), the declarations made by co-defendants Frank and Borgman (also known as "Miller") at the meeting of September 24, 1968 were "introduced for the purpose of proving facts contained in, or asserted by, those statements" and were consequently hearsay. See *United States* v. *Williamson*, 450 F.2d 585, 589 (5th Cir.), cert. den. 405 U.S. 1026 (cited by the Government). As a matter of fact, such declarations constituted the only direct evidence binding on any of the defendants to show the excessiveness of the prices paid by Planinvest to the Bahamian corporations, Columbia and Splindian, for the two parcels of Canadian real property here involved.

Thus, while there was evidence to show the prices paid to the original sellers by the intermediate purchasers, Kay and Miss Comeau, for such properties, there was no evidence to show how much was paid by Columbia to Kay for the parcel involved in the first transaction, or by Splindian to Miss Comeau for the parcel involved in the second transaction (See Pet., p. 6). Furthermore, there was otherwise no evidence as to the values of the two parcels of land involved, nor any expert testimony thereon. Nor was there any evidence to show that petitioners Hemlock or Hoffer had any knowledge of the prices paid to the original sellers (Pet., p. 6).

The admissions made by Frank and Borgman as to the excessiveness of the prices paid by Planinvest, coupled with their bizarre explanation as to the use made of the money "to pay off the CIA", constituted highly damaging evidence which must surely have prejudiced petitioners Hemlock and Hoffer in the minds of the jury in view of the absence of any limiting instructions. It may be noted in this connection that all the activities which the Government notes (br., p. 13), were shown to have been engaged in by Hemlock and Hoffer, were fully consistent with

their having acted merely in their capacity as attorneys (see Pet., p. 17).

The additional arguments advanced by the Government (br., pp. 13-14) are fully answered in the petitions herein (Hemlock Pet., pp. 8-12; Hoffer Pet., pp. 10-11). It may be noted that there is not an iota of evidence in the record—*and none is cited by the Government*—to support its contention (br., p. 13) that "the conspiracy was still in effect after the two real estate transactions had been consummated, since there was evidence of a willingness to make further fraudulent deals if the opportunity presented itself" (see Hemlock Pet., p. 11, fn. 6).

In a further spurious effort to show that the conspiracy was still continuing on September 24, 1968, when Frank and Borgman made the declarations here involved, the Government (br., pp. 13-14), attempts to give the erroneous impression that the cash withdrawals from the time deposits in the Columbia and Splindian bank accounts in Nassau were made at or about the same time. The evidence, however, showed that the time deposits were opened in about January or February 1968 and that the cash withdrawals were made therefrom within a period of 30 to 60 days thereafter; i.e., no later than March or April 1968, more than five months prior to the meeting of September 24, 1968 (637a-642a).

It is immaterial that Frank's purpose might have been "to protect the success of the fraud", as asserted by the Government (br., p. 14), or to forestall any civil suit by Mrs. Dominguez, as asserted by the Court of Appeals (Pet., App. A, pp. 20a-21a). As pointed out in the Hemlock petition (pp. 11-12), any efforts on the part of the conspirators to retain the fruits of their crime or to forestall a civil suit by the victim, would be the equivalent of nothing more than a purpose to "conceal" or "cover up" their crime, such as was involved in *Krulewitch* v. *United*

States, 336 U.S. 440, 443-5, and *Grunewald* v. *United States*, 353 U.S. 391, 399-402.

Cases on which the Government relies, such as *United States* v. *DeSapio*, 435 F.2d 272, 284 (2d Cir.), cert. den. 402 U.S. 999, are clearly distinguishable. Thus, in *DeSapio*, the court emphasized that the purpose of the declarant co-conspirator was, not "to conceal facts in order to prevent detection, conviction and punishment", but rather to attempt to achieve some remaining affirmative objectives of the conspiracy (435 F.2d at 284). No such situation is here presented.

IV.

As to the other issues.

(a) As to the "harmless error" doctrine.

The Government (br., pp. 14-16) makes no effort to meet the issue raised by petitioners (Pet., pp. 14-17) as to whether there is any warrant for applying different standards of harmless error on the basis of whether the error affects constitutional rights.

The Government (br., p. 16) apparently suggests that petitioners are in no position to complain of the errors committed by the trial court since they did not "offer a written version of the instruction they would have preferred (Rule 30, Fed. R. Crim. P.)". That suggestion, however, is wholly without merit. The Court of Appeals itself pointed out in its opinion that the issue as to whether a conviction in the criminal case would be entitled to collateral estoppel effect in Mrs. Dominguez' civil action, was properly raised in the trial court, not only by objections to the trial judge's charge but also by defense counsel's

request for an instruction on the subject (see Pet., p. 14; *id.*, App. A, pp. 28a-29a).[5]

There is likewise no merit to the Government's claim (br., p. 16) that "the instructional error was harmless even by the stricter *Chapman* standard." (See Pet., p. 15, fn. 9).

(b) As to the standards applicable under the mail fraud statute, 18 U.S.C. § 1341.

The Government (br., p. 10; see also br. op. Borgman-Frank petitions, pp. 12-13) attempts to distinguish *United States* v. *Maze*, 414 U.S. 395, on the ground that the two real estate transactions here involved necessarily remained incomplete until the Canadian notary, Solomon, had sufficient documentary evidence to be satisfied that Mrs. Dominguez' Luxembourg corporation, Planinvest, was "empowered to buy and hold real estate."

The evidence, however, undisputedly shows that Solomon proceeded with the closing of the first transaction, even to the point of filing the pertinent documents in the Montreal registry office, without waiting to receive any of the papers which Hoffer promised to send him (Pet., p. 19). Similarly, even though Solomon never received the information relating to Planinvest's power to own real estate, for which he

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[5] As a matter of fact, as was pointed out in petitioners' joint petition for rehearing in the Court of Appeals (pp. 4-5), the Government's requested instructions on the issue of collateral estoppel, which were adopted practically verbatim by the trial court in its main charge, were embodied in supplemental requests to charge which were not served on defense counsel until the morning of the day on which the trial judge delivered his charge to the jury, and no opportunity was afforded to defense counsel to voice any objections thereto until the trial court delivered its charge adopting the Government's supplemental requests. Indeed, as the Court of Appeals itself pointed out (Pet., App. A, p. 32a), it was not necessary at all for the trial court to charge on the matter here involved. It was only the Government that requested such a charge, and defense counsel could not be certain until the actual charge that there would be any instructions on the subject.

wrote to Hoffer on January 30, 1968, Solomon nevertheless proceeded with the consummation of the second transaction in Nassau on February 5, 1968 (Pet., pp. 19-20).

(c) As to the Bahamian bank secrecy statute.

In its brief herein (pp. 10-11), as well as in its brief in opposition to the Borgman and Frank petitions (p. 17), the Government urges that the individual petitioners have no standing to raise the issue relating to the Bahamian bank secrecy statute since the Bahamian bank accounts here involved were opened by petitioners Hemlock and Hoffer in the names of the two Bahamian corporations, Columbia and Spindian. It is submitted, however, that the individual petitioners do have such standing, particularly since the Government has here urged that the two Bahamian corporations were actually petitioners' *alter egos*. In any event, the Government has in no way shown that the issue raised by petitioners is not an important one worthy of review by this Court, and its injection of the issue of standing merely serves to present an additional important and novel question for this Court's consideration.

CONCLUSION

For the reasons set forth in the petitions herein and in this reply brief, the petitions for writs of certiorari should be granted.

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